FILED
JAN 17 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-711

IN THE

Supreme Court of the United States

XAVIER UNIVERSITY OF LOUISIANA,
Petitioner,

v.

TRAVELERS CASUALTY PROPERTY COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

Petitioner, Xavier University of Louisiana ("Xavier") submits this Reply Brief to the Brief in Opposition filed by Respondent, Travelers Property Casualty Company of America ("Travelers"), to Xavier's Petition for a Writ of Certiorari ("Petition"). The arguments raised by Travelers in its opposition are without merit. The central issue in this case is whether the United States Fifth Circuit Court of Appeals erred when it refused to certify the sole issue

of state law before it on appeal to the Louisiana Supreme Court when it was well aware that numerous state district courts had already ruled in a manner consistent with the District Court below and that at least one of these cases was making its way through the state appellate system.

Travelers' search for a similarly situated case misses the mark. This is not a typical lawsuit. Xavier's claim is one of thousands by individual insureds who filed suit against their insurers for coverage for damages resulting from the levee breaches. The sole issue of state law facing the Court of Appeals, whether a so-called "flood" exclusion applies to man-made events, is important to the citizens and businesses of southeast Louisiana who sustained catastrophic damages when the levees surrounding the city of New Orleans failed resulting in a massive inundation.

In their lengthy search for an answer to these issues, these citizens have been presented with conflicting answers to their questions, a result that, much like the levee failures, was entirely avoidable in the present case. Given the significance of the issues presented, a unified voice on an unanswered question of Louisiana was possible. Indeed, the Louisiana Supreme Court has now recognized the significance of the issue: it has scheduled oral argument on this issue for **February 26, 2008**, less than two months after the court was asked to consider the issue. In the case below, the Court of Appeals erred when it refused to follow the precedent of this Court, the guidance of other Courts of Appeals, and its own precedent when it refused certification of this matter to the Louisiana Supreme Court. Xavier's Petition should, therefore, be granted.

I. The Fifth Circuit's erroneous holding is not so "clear cut" as Travelers would suggest given the Louisiana Fourth Circuit Court of Appeal's contrary ruling in *Sher* that the term "flood" is ambiguous.

Travelers suggests that granting Xavier's writ is not proper in this case because there is no "clear cut" intervening decision suggesting that the Fifth Circuit's opinion was in error. As noted in Xavier's Petition, the Louisiana Fourth Circuit Court of Appeal recently held that the term "flood" was ambiguous as a matter of law. *See Sher v. Lafayette Ins. Co.*, 2007 WL 4247708 (La. App. 4th Cir. 11/19/07). Travelers attempts to discount the effect of the *Sher* opinion, even going so far in one instance as to suggest that one of the judges on the panel "abstained" from the result. That did not happen. A five-judge panel heard the case. Two judges wrote an opinion expressing their belief that the term "flood" was ambiguous, and a third judge agreed with that result and concurred in the judgment. A majority of the court, then, concluded that the term "flood" is ambiguous and should be limited to exclude from coverage only naturally occurring events.

The fact that the result reached by the *Sher* court conflicts with the Fifth Circuit opinion below, which itself conflicted with the district court opinion, highlights the fact that the Louisiana Supreme Court must be the final arbiter of this issue. That the federal and state intermediate appellate courts in Louisiana have reached opposite conclusions on the same issue creates confusion and fosters only judicial inefficiency. The certification process is designed to eliminate such an occurrence. At the time of its

ruling, the Fifth Circuit was well aware of the potential for conflicting results and that Louisiana's state appellate courts would soon be considering the proper interpretation of the "flood" issue. Rather than defer to the Louisiana courts, however, the Court of Appeals made its own "*Erie*-guess" about Louisiana law. Insisting upon making a "guess" instead of simply certifying the issue is contrary to established principles of federalism and should be overturned.

II. The Louisiana Supreme Court has recognized the importance of the issues presented by the conflicting decisions in *In re Katrina* and *Sher* and has agreed to consider *Sher* on an expedited basis.

Following the Fourth Circuit's ruling in *Sher*, the defendant, Lafayette Insurance Company filed an application for Writ of Certiorari and/or Review with the Louisiana Supreme Court. The writ application was filed in December 2007, and we requested that the Court consider the application on a priority basis. On January 11, 2007, the Court issued an order granting Lafayette's writ application. *See Sher v. Lafayette Ins. Co.*, Order Granting Writ Application No. 2007-CA-0757, attached at Appendix 1a. The Court further advised that it would hear oral argument on this matter on February 26, 2008 following an expedited briefing schedule. *See* January 11, 2008 Letter from Louisiana Supreme Court, attached at Appendix 3a.

The Louisiana Supreme Court acted with diligence in scheduling oral argument in this matter less than two months after granting a request for a writ application. The Fifth Circuit, aware that the interpreta-

tion of the so-called "flood exclusion" would likely be presented to the Louisiana courts of appeal and the Louisiana Supreme Court chose not to certify the issue to the Louisiana Supreme Court. Its decision led to uncertainty and inefficiency and, for reasons stated herein and in Xavier's Petition, constituted a breach of its discretion.

III. That Xavier initiated this litigation in federal court is not a basis for precluding it from seeking certification of important state law issues to a state's highest court.

Travelers further erroneously contends that certification is not appropriate in this matter because Xavier is the party seeking the jurisdiction of the federal court. Those courts refusing certification on because of a litigant's choice of a federal form basis did so where the ***appellant*** was the party who had invoked federal court jurisdiction and sought a different result from the state court. This was the factual scenario before the Fifth Circuit in *Jefferson v. Lead Industries Association*, 106 F.3d 1245 (5th Cir. 1997), and the cases on which it relies for denying certification based on the appellants' invocation of federal jurisdiction. *See Jefferson*, 106 F.3d at 1248 & n.10. *See also Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) (declining certification, in part, because the appellants "chose to litigate these claims before the district court, fully aware that neither of the relevant jurisdictions recognize the theories they were advancing."); *Nat'l Bank v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988) (refusing certification where the appellant had removed the matter to federal court after an adverse ruling of the state court that

he sought reconsideration of in federal court and on appeal).

Xavier is hardly a dis-satisfied litigant seeking certification after failing to persuade a district court to rule in its favor. Indeed, Xavier prevailed in its arguments to the District Court. Rather, Xavier requested certification so that this important issue may be decided by the Louisiana Supreme Court, which is the only court that will provide finality regarding the issues surrounding the proper interpretation of the water damage exclusion and end the confusion created by inconsistent rulings by the federal and state appellate courts. Travelers' suggestion that this Court should refuse certification simply because Xavier invoked federal subject matter jurisdiction is without merit in this case.

IV. Louisiana's rules for insurance policy interpretation are as nearly well settled as those in Texas and other states.

Finally, Travelers insists that the Fifth Circuit did not act contrary to its own precedent or that of other federal Courts of Appeals when it refused to certify issues of insurance policy interpretation to the Louisiana Supreme Court because the rules of interpretation are clearer in Louisiana than in other states. The fact that Louisiana is a civilian jurisdiction with codal principles setting the background for contract interpretation is irrelevant to a decision that certification was appropriate. All states have similar, established principles of insurance policy and contract interpretation, and numerous Courts of Appeals have concluded that certification is still appropriate given significant and unsettled questions of state law.

For example, in *Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. 2004), the Fifth Circuit declined to make an *Erie*-guess about an unsettled issue of insurance policy interpretation and, "given the significance of the issue" certified the question of interpretation to the Texas Supreme Court. *See id.* at 811. The Texas Supreme Court accepted the certification and rendered its opinion on the policy. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006). In its introductory statements, the court noted that "the rules for construing insurance policies have been around for a long time, long before this dispute arose. Those rules require us to construe a policy according to what it says, not what regulators or individual insurers thought it said." *Id.* at 745.

The Texas Supreme Court introduced its discussion of legal issues by noting the following:

> ***The rules for construing this provision are well settled.*** If a policy provision has only one reasonable interpretation, it is unambiguous and we must construe it as a matter of law. If an exclusion has more than one reasonable interpretation, we must construe it in favor of the insured as long as that construction is not unreasonable. A policy provision is not ambiguous merely because different parties or different courts have interpreted it any differently.

Id. at 746 (emphasis added).

This pronouncement of well settled law is similar to the manner in which the Court of Appeals introduced its legal discussion in its opinion below. Thus, contrary to Travelers' unfounded assertions, Texas courts have established definitive guidelines for policy interpretation that are no less settled than those

principles in Louisiana. The fact that Louisiana's principles are enshrined in the Civil Code is of no moment. The Fifth Circuit in *Fiess* and the other cases cited by Xavier in its Petition had well established principles of insurance policy interpretation from the Texas Supreme Court on which it could have relied in determining the various matters before it; however, it still chose to certify the issue.

In *Fiess* and those cases cited by Xavier in its Petition, the Court of Appeals recognized the lack of guidance from the Texas Supreme Court and the importance of the legal issues before it. Rather than make its own guess as to the appropriate meaning of Texas law, the Fifth Circuit deferred to the Texas Supreme Court for a definitive and ultimate resolution of the issues.

The Fifth Circuit's refusal to follow its prior course of action in the present case is an abuse of discretion. The Fifth Circuit could have followed the Texas Supreme Court's "well established" and long standing legal principles and reached a decision in *Fiess*. Its decision not to do so resulted in greater judicial efficiency in the long run and avoids confusion by eliminating the specter of conflicting appellate results. The refusal to do the same in this case is an abuse of discretion that should not be countenanced.

CONCLUSION

For the foregoing reasons, Xavier respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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January 2008

APPENDIX

APPENDIX A

SUPREME COURT OF LOUISIANA

No. 2007-C-2443

JOSEPH SHER,

VS.

LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.

Granted: January 11, 2008

In Re: Joseph Sher and Lafayette Insurance Company, applying for Certiorari and/or Review, No. 06-9276, on the docket of the Civil District District Court for the Parish of Orleans, and No. 2007-CA-0757 on the docket of the Court of Appeal, Fourth Circuit, State of Louisiana.

And, whereas, the Court has this date, pursuant to Article 5, Section 5, of the Constitution of Louisiana, made and issued the following order, to wit— "It is ordered that the writ of review issue; that the District Court and the Court of Appeal send up the record in Duplicate of the case; and that counsel for all parties be notified."

Now, therefore, the said District Court and the Court of Appeal are hereby commanded, in the name of the State of Louisiana and of this Honorable Court,

to send up forthwith to this Court, at the City of New Orleans, the record in duplicate of the above entitled case.

Witness the Honorable Justices of the Supreme Court of the State of Louisiana, on this 11th day of January, in the year of our Lord, Two Thousand Eight.

John Tarlton Olivier
Clerk of Court

/s/ Katherine A. Fontana
KATHERINE A. FONTANA
Deputy Clerk of Court

APPENDIX B

STATE OF LOUISIANA,
New Orleans

No. 2007-C-2443

JOSEPH SHER,

vs.

LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.

On Writ of Certiorari and/or Review to the Court of Appeal Fourth Circuit, No. 2007-CA-0757; Civil District Court, Parish of Orleans Division G, No. 06-9276, Hon. Robin Giarrusso, Judge Presiding

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The writ application in the above entitled matter has been granted and scheduled for oral argument in this Court on February 26, 2007. Therefore, briefing time is shortened.

Briefs on behalf of applicant are due on or before January 30, 2008 and briefs on behalf of respondent are due on or before February 19, 2008. In all other respects, the filing of the briefs are governed by Rule VII of the Rules of this Court.

John Tarlton Olivier
Clerk of Court

/s/ Katherine A. Fontana
KATHERINE A. FONTANA
Deputy Clerk of Court